No. 77-486

In the Supreme Court of the United States

OCTOBER TERM, 1977

WILLIAM C. MCCORKLE, JR., PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3-12) is reported at 559 F. 2d 1258. The order of the district court (Pet. App. 1-2) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on July 26, 1977. The petition for a writ of certiorari was filed on September 28, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether 2 U.S.C. (1970 ed.) 359(1)(B), which until its repeal in 1977 authorized a single House of Congress to disapprove salary changes recommended by the President for certain executive, legislative, and judicial

officials, violated the law-making procedures established by Article I, Sections 1 and 7 of the Constitution or otherwise violated the separation of powers established by Articles I, II, and III of the Constitution.

2. Whether 2 U.S.C. (1970 ed.) 359(1)(B) was severable from the remainder of the salary adjustment provisions of the Postal Revenue and Federal Salary Act of 1967, 81 Stat. 642, 2 U.S.C. (1970 ed.) 351 *et seq.*

3. Whether 5 U.S.C. 5308, which establishes a ceiling on salaries paid to General Schedule federal employees, violates the equal protection component of the Due Process Clause.

STATUTES INVOLVED

5 U.S.C. 5308 provides:

> Pay may not be paid, by reason of any provision of this subchapter, at a rate in excess of the rate of basic pay for level V of the Executive Schedule.

The pertinent portions of the Postal Revenue and Federal Salary Act of 1967, 81 Stat. 642, 2 U.S.C. (1970 ed.) 351 *et seq.*, are set forth at Pet. 4-5.

STATEMENT

1. Petitioner is a civilian employee of the Department of Defense whose salary is determined by the pay rates for grades 16 to 18 on the General Schedule (Pet. 7-8; 10 U.S.C. 1581). He seeks to represent the class of all federal employees in General Schedule pay grades GS-15 through GS-18 whose salaries have been affected by 5 U.S.C. 5308 and 2 U.S.C. (1970 ed.) 359(1)(B) (Pet. App. 5).[1]

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[1]Petitioner is subject to 10 U.S.C. 1581(b), which provides that certain Defense Department employees shall be paid not less than a GS-16 nor more than a GS-18 (Pet. 8).

The Federal Pay Comparability Act of 1970, 5 U.S.C. (and Supp. V) 5301 *et seq.* ("Comparability Act"), authorizes annual cost-of-living adjustments to the salaries of federal employees governed by General Schedule ("GS") pay rates and other specified statutory pay systems. Pursuant to 5 U.S.C. 5308, however, salaries adjusted under the Comparability Act cannot exceed "the rate of basic pay for level V of the Executive Schedule." The Executive Schedule establishes pay rates for Cabinet officers, heads of regulatory boards and commissions and their deputies, and certain other specified upper-level management and policy-making officials. 5 U.S.C. 5311 *et seq.*

Between 1969 and 1975, the basic pay for level V, the lowest level on the Executive Scheduie, was $36,000. 34 Fed. Reg. 2242 (1969). In 1975, it was raised to $37,800 (Exec. Order 11883, 40 Fed. Reg 47091, 47099), and in 1977 it was further raised to $47,500 (42 Fed. Reg. 10297). During this period, GS salaries also have been increased, but the salaries of some of the employees in the four highest pay grades (GS-15 through GS-18) have been limited by the ceilings imposed by 5 U.S.C. 5308.[2] See, *e.g.*, Exec. Order 11883, *supra.* Petitioner contends that the ceilings imposed by 5 U.S.C. 5308 violate the equal protection guarantee of the Fifth Amendment with respect to all employees whose salaries it limited (Pet. 24-25).

Petitioner also challenges the constitutionality of Section 225 of the Postal Revenue and Federal Salary Act of 1967, 81 Stat. 642, 2 U.S.C. (1970 ed.) 351

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[2]Some employees in the lower "steps" within those grades were not affected by the ceiling.

et seq. ("Salary Act"). Pursuant to this Act, President Nixon recommended salary increases in 1974 for Executive Schedule officials, Congressmen, and federal judges, as well as other executive, legislative, and judicial officials. See H.R. Rep. No. 93-870, 93d Cong., 2d Sess. 2-5 (1974).[3] The Act provided, however, that the President's recommendations would not become effective if, within thirty days after receiving the recommendations, either "House of Congress has enacted legislation which specifically disapproves all or part of such recommendations * * *." 2 U.S.C. (1970 ed.) 359(1)(B). Pursuant to this provision, the Senate passed S. Res. No. 293, 93d Cong., 2d Sess. (1974), disapproving all of the President's 1974 Salary Act recommendations. See 120 Cong. Rec. 5492-5508 (1974). Congress subsequently repealed 2 U.S.C. (1970 ed.) 359(1)(B) in 1977. Pub L. 95-19, 91 Stat. 45.

2. The district court dismissed petitioner's complaint without ruling upon his motion to maintain a class action. The court held that the salary ceiling imposed by 5 U.S.C. 5308 has a rational basis and therefore does not deprive petitioner of equal protection, and also held that the constitutionality of 2 U.S.C. (1970 ed.) 359(1)(B) was nonjusticiable (Pet. App. 1-2). The court of appeals affirmed (Pet. App. 3-12).

The court of appeals agreed with the district court that 5 U.S.C. 5308 has a rational basis. The court of appeals declined to decide the constitutionality of the one-House veto provision of 2 U.S.C. (1970 ed.) 359(1)(B), which had been repealed while the appeal was pending, on the

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[3]As part of these recommendations, the President proposed that the Executive Schedule level V pay rate be increased to $38,700 in 1974, to $41,600 in 1975, and to $44,700 in 1976.

ground that it could not be severed from the remainder of the pay adjustment provisions of the Salary Act. The court concluded that if the one-House veto provision and the Senate's 1974 action pursuant to it were held invalid, the other statutory provisions on which petitioner's claim to a pay increase depended also would fall.

ARGUMENT

1. The court of appeals correctly decided that former 2 U.S.C. (1970 ed.) 359(1)(B) was not severable from the remainder of the pay adjustment provisions of the Salary Act.[4] This issue, which involves only the application of settled principles to the particular legislative history of the Salary Act, does not warrant further review. As the court stated, "the legislative history [of the Salary Act] establishes that Congress would not have delegated authority to the President to establish salaries without the provision for the one-house veto" (Pet. App. 11). That legislative history, set forth by the court below (Pet. App. 10-11), demonstrates that the sponsors of the 1967 Salary Act expressly and repeatedly relied upon the one-House veto provision in overcoming Congress' strongly felt reluctance to delegate salary-setting authority to the President. That provision therefore was not severable from the remaining pay adjustment provisions of the Salary Act. See *Champlin Refining Co.* v. *Corporation*

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[4]As we discuss in our brief in opposition to the petition for a writ of certiorari in *Atkins* v. *United States*, No. 77-214, a copy of which is being furnished to counsel for petitioner, we concede that 2 U.S.C. (1970 ed.) 359(1)(B), which authorized a single House of Congress to disapprove, in whole or in part, the President's pay recommendations under the Salary Act, was unconstitutional.

Commission, 286 U.S. 210, 234. Petitioner points to nothing in the legislative history of the 1967 Salary Act to support a contrary conclusion (see Pet. 20-23).[5]

Petitioner argues, however, that this Court should decide the constitutionality of the one-House veto provision because of its importance (Pet. 23). The unquestioned importance of the general issue, however, serves to underscore the need to decide it in a case where it is clearly presented. It is not clearly presented here. If the provision for a one-House veto was constitutional, the Senate's veto of the President's 1974 recommendation was valid; on the other hand, if that provision was unconstitutional, because the provision is not severable the entire statutory scheme falls, leaving no statutory authority for the President's recommendation of a pay increase. Either way, petitioner would have no statutory basis for his claim for additional pay.

2. The court of appeals correctly held that the pay ceiling of 5 U.S.C. 5308 has a rational basis and therefore satisfies due process (see Pet. App. 6-8; *id.* at 1-2). By limiting GS salaries to the minimum paid under the Executive Schedule, Congress has established a logical relationship between the two pay schedules and prevented some GS employees from receiving a larger salary than their superiors on the Executive Schedule.[6] The statute

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[5]There is no basis for petitioner's claim (Pet. 21) that the repeal of the one-House veto provision in 1977 bears on the importance Congress ascribed to it in 1967.

[6]The problem underlying this action arose in large measure because periodic increases were made in the GS pay rates without corresponding increases in the Executive Schedule. Congress addressed this problem in 1975 by enacting the Executive Salary Cost-of-Living Adjustment Act, 89 Stat. 421. This Act extends to the Executive Schedule and to other positions the annual cost-of-living adjustments in the General Schedule made pursuant to the Comparability Act. See 5 U.S.C. (Supp V) 5318. Congress can, of course, refuse to appropriate funds to implement such annual Executive Schedule increases—as it has done on two occasions. See Pub. L. 94-440, 90 Stat. 1439; Pub. L. 95-66, 91 Stat. 270. Nevertheless, the new statutory framework facilitates annual cost-of-living adjustments to both the General and Executive Schedules, thereby facilitating increases in the 5 U.S.C. 5308 ceiling. Thus, the current statutes should substantially remedy the problem to which petitioner's suit draws attention.

therefore meets the requirements of due process. See *Richardson* v. *Belcher*, 404 U.S.C. 78, 81; *Massachusetts Board of Retirement* v. *Murgia*, 427 U.S. 307, 312.[7]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[7]Petitioner concedes (Pet. 24) that 5 U.S.C. 5308 does not establish a suspect classification that would warrant strict judicial scrutiny.

*The Solicitor General is disqualified in this case.

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